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VIA HAND DELIVERY

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12" Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: *Ex Parte* Presentation
CC Docket Nos. 01-337, 01-338 and 02-33

Dear Ms. Dortch

On October 22,2002, Steven Teplitz, Vice President and Associate General Counsel, AOL Time Warner Inc. ("'AOL"),Donna N. Lampert and the undersigned, both of Lampert and O'Connor, P.C., met with Brent Olson, Cathy Carpino, Jeremy Miller and Elizabeth Yockus of the Wireline Competition Bureau, Harry Wingo of the Office of General Counsel and Richard Hovey of the Office of Engineering and Technology to discuss the above-referenced dockets.

In the meeting, consistent with AOL's Reply Comments filed on April 22,2002 in CC Docket No. 01-337 and its Comments and Reply Comments filed on May 3,2202 and July 1, 2002 respectively in CC Docket No. 02-33; we discussed the following four points.

We explained first that all evidence in the record and the Commission's own statements demonstrate that the ***Computer Inquiry*** requirements serve the public interest by fostering full and robust information services competition. These requirements have provided ISPs with the opportunity to offer a wide array of applications and content at differing prices to meet the diverse needs of consumers and stimulate growth and demand. **As** the experience in narrowband has shown, ISPs will lead the way in stimulating consumer acceptance of and demand for broadband so long **as** they have the opportunity to access ILEC transmission services at reasonable rates and on nondiscriminatory terms and conditions. Moreover, the ***Computer Inquiry*** requirements have served the public interest by preventing the BOCs from discriminating against competitors; there is no evidence that the requirements have impeded the development of new information services. To the contrary, the BOC ISPs are free to compete with all other ISPs to provide innovative, new information services to consumers. The ***Computer Inquiry*** requirements simply ensure that the BOCs do not discriminate or otherwise act in an anticompetitive manner against independent ISPs. Ensuring that ISPs have the opportunity to

compete will stimulate overall investment, innovation and consumer welfare. If the Commission eliminates the ***Computer Inquiry*** requirements, the diversity of information services that consumers enjoy today will diminish and consumer demand will decrease.

Second, we stressed that although competition exists for broadband retail Internet access services it does not mean that there is competition for wholesale transmission inputs. Cable companies, wireline companies and thousands of ISPs offer broadband Internet access to consumers. In the market for broadband retail services, there is full regulatory parity and no provider of broadband information retail services is regulated. Yet, competition in retail information services does not mean that the ILECs are not dominant in the provision of wholesale DSL services. In fact, the Commission's own data shows that the ILECs remain dominant for wholesale DSL inputs and that is why the Commission has maintained the ***Computer Inquiry*** rules. Even if the Commission accepts the BOC arguments that wholesale DSL prices could be constrained by cable retail prices, which it should not, the Commission has also recognized that anticompetitive behavior can be exercised in other ways, including through inferior interconnection, delays in provisioning, service degradation, unfair negotiating tactics and discriminatory terms and conditions.

Third, we urged that the Commission cannot lawfully define away Title II wholesale DSL telecommunications services. The Commission has repeatedly found that wholesale DSL services are telecommunications services. In this regard, we provided the attached handout that lists some of the Commission's precedent establishing that wholesale DSL is a telecommunications service as well as some of the cases where the courts have relied on that precedent. The precedent also demonstrates that the transmission services used to provide information services are subject to Title II and that the ***Computer Inquiry*** requirements are grounded in Title II as well. Further, we explained that the Commission cannot ignore the fact that wholesale DSL services are squarely within the ***NARUC*** I precedent. We emphasized that the Commission must recognize that this is not merely an issue of changing labels; there are millions of consumers that will be affected if they can no longer be assured that their ISP will be able to obtain DSL services on a transparent and nondiscriminatory basis.

Finally, we noted that any attempt to regulate under Title I will create enormous regulatory and legal uncertainty. We explained that if the Commission abandoned Title II and decided instead to regulate pursuant to Title I, it would have to create a new regulatory scheme designed to mirror Title II requirements, severely weakening and even eliminating its enforcement authority given that parties would have no precedent to rely upon for effective enforcement. **Further,** by reclassifying these services and attempting to impose a new Title I regime, the Commission will eliminate its authority to protect the public interest in numerous cases, including Section 214 discontinuances, CALEA and CPNI and will raise serious questions regarding its authority to ensure network reliability and security.

Pursuant to Section 1.1206(b) of the Commission's rules, two copies of this letter and the attachment are being provided to you for inclusion in the public record in each of the above-captioned proceedings. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Linda L. Kent
Counsel for **AOL** Time Warner Inc.

Attachment

cc: Brent Olson
Cathy Carpino
Jeremy Miller
Elizabeth Yockus
Richard Hovey
Harry Wingo

CLEAR PRECEDENT ESTABLISHES THAT WHOLESALE DSL IS A "TELECOMMUNICATIONS SERVICE"

FCC Orders:

- In 2001 *CPE/Enhanced Services Unbundling Order*, the FCC held DSL services are subject to Title II of the Act:

  "The internet service providers require ADSL service to offer competitive internet access service. We take this issue seriously, and note that all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers. . . .In addition, we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act."

  Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order, 16 FCC Rcd 7418, ¶ 46 (2001).

- The FCC's 1999 *Advanced Services Second R&O* held that:

  "...bulk DSL services sold to Internet Service Providers . . . are telecommunications services, and as such, incumbent LECs must continue to comply with basic common carrier obligations with respect to these services."

  Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order, 14 FCC Rcd. 19237, ¶ 21 (1999).

- The FCC's 1998 *Advanced Services MO&O* held that advanced services offered by incumbent LECs, including DSL:

  "...are telecommunications services ...To the extent that an advanced service does no more than transport information of the user's choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is 'telecommunications,' as defined by the Act. Moreover, to the extent that such a service is offered for a fee directly to the public, it is a Telecommunications service.'"

  The *Advanced Services MO&O* also held that:

  "Incumbent LECs have proposed, and are currently offering, a variety of services in which they use xDSL technology and packet switching to provide members of the public with a transparent, unenhanced, transmission path. Neither the petitioners, nor any commenter, disagree with our conclusion that a carrier offering such a service is offering a Telecommunications service'...BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services."

  Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, 13 FCC Rcd. 24011, ¶¶ 35-37 (1998).

- In the *GTE DSL* ***Order,*** the FCC correctly concluded that:

  "GTE's ADSL service is a special access service, thus warranting federal regulation. . ."

  "The Commission previously has distinguished between the 'telecommunications services component' and the 'information services component' of end-to-end Internet access"

  "We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable," citing 47 U.S.C. §§ 204-205.

  GTE Telephone Operating Cos., Memorandum Opinion and Order, CC Docket 98-79, 13 FCC Rcd. 22466, ¶¶ 25, 20, n. 111 (1998).

- In FCC's **1999** CALEA order, FCC stated:

  "digital subscriber line (DSL) services are generally offered as tariffed telecommunications services, and therefore subject to CALEA, even though the DSL offering would be used in the provision of an information service."

  Communications *Assistance* for Law Enforcement, Second Report and Order, 15 FCC Rcd. 7105, 7120 (1999).

- FCC has frequently explained in Section 214 discontinuance proceedings that carrier discontinuance (including nondominant carriers) of DSL services entails Title II obligations.

  Sprint proposes "to *discontinue Sprint Business DSL, a domestic telecommunications service"*

  "Comments Invited on Sprint Communications Company L.P. Application to Discontinue Domestic Telecommunications Service," FCC Public Notice, DA 02-2600 (rel. Oct. 9, 2002).

  DSL telecommunications services to be discontinued by Rhythms Link are subject to Title 11 discontinuance process.

  Rhythms Links *Inc.* Section *63.71* Application to Discontinue Domestic Telecommunications Services, Order, 16 FCC Rcd. 17024, 17025 (CCB 2001).

Courts Have Relied on FCC's Several Orders:

- The 2001, DC Circuit's *ASCENT I* noted that:

  "The Commission determined that advanced services are telecommunications services like any others...As the Commission concedes, Congress did not treat advanced services differently from other telecommunications services..."

  ASCENT *v.* FCC, 235 F. 3d 662, 664 (D.C. Cir. 2001).

- In 2002, two Supreme Court Justices in *NCTA v. Gulf Power Co.* explained:

  "Notably, when high-speed Internet access is provided over phone lines, in what is generally known as DSL service, the FCC has classified the first step of this process as involving the provision of a telecommunications service."

  NCTA *v.* Gulf Power *Co.*, 534 U.S. 327, 353 n. 4 (2002) (dissenting opinion of J. Thomas and J. Souter)